IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 756 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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GAJENDRAGIRI GURUGIRI SHANKARGIRI GAJENDRASINH & 1 - Appellant(s)
Versus
THE STATE OF GUJARAT - Opponent(s)

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Appearance :
THROUGH JAIL for Appellant(s) : 1 - 2.MS SADHANA SAGAR for Appellant(s) : 1 - 2.

MR RC KODEKAR, Additional Public Prosecutor for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 29/09/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K. A. PUJ)

1. The present appeal is filed by the appellants-original accused through jail who were convicted under Section-20B(2) read with Section-29 of the Narcotic Drugs & Psychotropic Substance Act, 1985 (hereinafter referred to as “the Act”) and under Section-66B and 36B read with Section-81 of Bombay Prohibition Act and were ordered to suffer rigorous imprisonment for a period of 10 years and fine of Rs. 1 Lacs each and in default thereof, to undergo further R.I of one year more. Though the accused were held guilty under Section-66B read with Section-81

of the Bombay Prohibition Act, no separate sentenced was awarded.

2. The case of the prosecution is that on 6.6.1999 when the Police Inspector was in the night round with his police personnel, at that time, at around 3:30 a.m when they reached at the Gomtipur Police Station, the secret information was received that two persons who looked like hermit and out of two, one of them appeared to be having long hairs and the small beard, wrapped in white loin while the upper body was not wrapped by any clothes while another person who has been wrapped by the clothes at the waist and worn the baniyan over the upper body, the colour of the clothes were saffron and having bracelet on the right side wrist, were about to pass through Kalidas cross road in a hired auto rickshaw with a narcotic substance and hence, the entry to that effect has been made into station diary bearing Entry No.5 of 1999

at about 3:40 a.m on 6.6.1999. They have thereafter started for raid. The superior officers were also intimated about the said secret information on the very same day i.e 6.6.1999.

3. Both the accused persons were nabbed near Kalidas cross road and they have been intimated about secret information on the spot in the hindi language. The accused No.1 wrote in hindi and accused No.2 gave thumb impression in the presence of panch witnesses that they did not want to be searched by the gazetted officer or any Magistrate and they also did not intend to search anybody from police party. After searching both the accused persons, contraband substance was found from the bag possessed by the accused No.1 and for primary inspection the officer of the Forensic Science Laboratory (F.S.L for short) was called upon to give the preliminary report about the analysis of the

contraband substance. The wordhy was received by F.S.L on 5:15 hrs and the said officer started from house at 5:25 hrs and in the presence of the panch witnesses in the prima facie opinion of the FSL officers, narcotic substance was proved to be charas. The search and seizer panchnama was started at about 4:00 a.m and at about 4:35 both the accused persons were nabbed. The Police Constable – Khengarbhai Bhavanbhai was sent for calling upon the person to weigh narcotic substance. One Devilal Nanalal Modi came with the scale and weighed the narcotic substance. The entire procedure and the panchnama was completed at about 7:00 a.m.

4. The FIR thereafter came to be lodged with the Gomtipur Police Station at about 7:00 o'clock and the report about the successful raid was sent to the superior officers on the same day and the report about the offence was also sent to Metropolitan Magistrate Court

No.10 on the same day. Thus, all the compliance under Sections-41, 42 and 50 had been observed. The muddamal was also sent to the FSL which was received by the FSL on 7.6.1999 in the sealed parcel and report about the narcotic substance was obtained.

5. Pursuant to the registration of the offence, the investigation was put into motion. During the course of investigation, statements of the witnesses were recorded. Based on the F.S.L. Report, since sufficient incriminating evidence was found against the accused, they were charge-sheeted in the Court of learned Additional Sessions Judge, Ahmedabad. The learned Additional Sessions Judge, Ahmedabad, who framed charge against the accused for commission of the offence punishable under Section-20B(2) read with Section-29 of the Act and under Section-66B and 36B read with Section-81 of Bombay Prohibition Act.

6. The charge was read over and explained to the accused as the accused have not pleaded guilty to the said charge. They were put to trial and tried by the learned Additional Sessions Judge, Ahmedabad in Sessions Case No.199 of 1999.

7. To prove the culpability of the accused, prosecution has in all examined as many as 12 witnesses. Prosecution has also produced several documents and relied upon the contents of the same. After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge, Ahmedabad explained the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement, as required under Section 313 of the Code. In his further statement, the accused denied the case of the prosecution by reiterating that they have

been falsely implicated.

8. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned Additional Sessions Judge, Ahmedabad has held that the prosecution has established beyond reasonable doubt that the charge levelled against the accused was proved and, therefore, the accused were held guilty of the offence punishable under Section-20B(2) read with Section-29 of the Act and under Section-66B and 36B read with Section-81 of Bombay Prohibition Act. The learned Additional Sessions Judge, Ahmedabad has, however, heard the accused and their advocate on sentence and looking to the gravity of the offence committed by the accused and looking to the circumstances, original accused were sentenced to suffer rigorous imprisonment of 10 years and fine of Rs. 1 Lac and in default thereof, to undergo R.I. of 1 year.

9. Ms. Sadhna Sagar, learned advocate appearing for the appellants – original accused has taken us through the oral as well as documentary evidence which are on record and also assailed the judgment and order of the learned Additional Sessions Judge, Ahmedabad dated 10.7.2000. She has submitted that the learned Additional Sessions Judge has committed error in convicting the appellants though there was no cogent or adequate evidence showing their guilt in the matter. She has further submitted that the learned Additional Sessions Judge, Ahmedabad has failed to appreciate that the appellants are innocent and have not committed the alleged offence. She has further submitted that the accused NO.2 was falsely implicated and nothing objectionable was found from the possession of the accused No.2. Simply because the accused No.2 was traveling in the same auto rickshaw he could not have been

implicated and/or held to be guilty of the alleged offence. In support of this submission she relied on the decision of the Hon'ble Supreme Court **in the case of Sorabkhan Gandhkhan Pathan and another vs. State of Gujarat, reported in (2004) 13 Supreme Court Cases 608**, wherein it is held that no material was produced to establish that the accused No.2 in that case had knowledge that accused No.1 was carrying contraband articles or was conniving with the said accused in carrying the contraband articles and hence conviction of accused No.2, in absence of any such material, only on the basis of his being in the autorikshaw was not sustainable. She further urged that the accused No.2 deserves to be acquitted on this ground.

10. So far as accused No.1 is concerned, she has submitted that the main prosecution witness No.1 i.e Ravindrakumar Kashiram Bhatt

Ex.11 has not been believed by the learned learned Additional Sessions Judge, Ahmedabad, and lot of contradictions and discrepancies were found in his deposition. The learned Additional Sessions Judge, Ahmedabad has in term held that the evidence of Ravindrakumar K. Bhatt did not inspire the confidence of the Court and it required corroboration from the other evidence, oral as well as documentary, if they are available on record. Mr.Bhatt was Police Inspector in ACB Department and he was discharging his duty as Police Inspector in Gomtipur Police Station since June, 1999. On the date of incident, when he was in night round and reached to the Gomtipur Police Station at about 3:30 a.m he received an information from the private informant about the accused persons that they were to go from Gitamandir to Meter-gaze Railway Station at about 3:30 a.m with contraband article. He has further stated that he intimated about this information to

ACP Mr.Upadhyay and DCP Mr.Sanjay Shrivastav on telephone. He has also made Entry No.5 of 1999 in the said diary by his own hand writing. He has further stated that at about 4:35 a.m one auto rickshaw from Sarangpur Bridge was coming towards Kalidas cross road and two persons were sitting therein. He has intercepted them and after searching them in presence of two panch witnesses the contraband articles were found from the possession of the accused No.1. He has further stated in his deposition that he himself has written all these documents in his own hand writing, such as information sent to superior officer Ex.13 and 14. Intimation about search by gazetted officer or Magistrate Ex.15 and 16. Calling FSL Official Ex.17, seizer memo and arrest memo at Ex.19 and 22. Information to relatives Ex.23. Complaint and FIR Ex.24 and 25. Two reports to Dy. Police Commissioner and Metropolitan Magistrate Ex.26 and 27

respectively. Ravangi nondh – Ex.28. Panchnama Ex.45 and entry in station diary Ex.32. All these documents are stated to have been written in his own hand writing and he has admitted this in his examination in chief. However, in his cross-examination he has stated that the documents Ex.16, 19 and 20 are in the hand writing of his writer – Madhubhai. Similarly Ex.13, 14, 22, 23 and 26 are also found to be of his writer – Madhubhai. PSI – Mr.Vaghela PW No.9 and Investigating Officer – PW No.10 have also confirmed that all these documents were not written by Mr.Bhatt.

11. Ms.Sadhna Sagar has further submitted that Mr.Khengar Bhavanbhai – PW No.2 Ex.34 is a Constable in Gomtipur Police Station and he was with Mr.Bhatt in the night round. He has stated in his deposition that the information was received from the private informant by Mr.Bhatt at 12:30 a.m and auto rickshaw came

at about 4:30 a.m. He was with Mr.Bhatt from 12:00 p.m to 8:00 a.m. He has further stated that the FSL Official was called from Shahibag and not from Mental Hospital, Meghaninagar. He has further stated that the examination of article was lasted upto 8:00 a.m.

12. Ms.Sadhna Sagar has further stated that PW No.3 Devilal Nanalal Modi Ex.36 has stated in his examination in chief that he has weighed the muddamal article at the place of incident whereas in his cross-examination he has stated that it was done at Gomtipur Police Station. Ganpatsinh Parmar – PW No.4 Ex.37 who is PSO Head Constable at Gomtipur Police Station has stated in his deposition that Mr.Bhatt has come at 7:15 a.m and entry was made in the station diary / crime register being Entry No.6 on page No.60 at 7:15 a.m.

13. Ms.Sagar further submitted that the panch witnesses were turned hostile and they did not support the case of the prosecution. She has further submitted that there were many persons whose evidence could have been collected at the place of incident, however the same was not done. She has further submitted that no witness from Kalidas cross road was examined. Even SRP choki was there and jeep of raiding party was parked there. However, no statement of SRP personnel was recorded. Thus, there were so many discrepancies in the deposition of the police personnel and in absence of any corroboration from any independent witness or from the panch witness, the learned Additional Sessions Judge, Ahmedabad should not have convicted the accused merely on the basis of statement of police officer. She has, therefore, submitted that the accused No.1 also deserves to be acquitted.

14.Mr.R.C.Kodekar, learned Additional Public Prosecutor, on the other hand has supported the order and judgment of the learned Additional Sessions Judge, Ahmedabad and submitted that there was no violation of any statutory provision and all necessary compliances were made by the raiding parties and/or investigating agency and there was no substance in the argument that the provisions contained in the Act were violated. He has further submitted that the alleged contradictions or discrepancies pointed out in the order of learned Additional Sessions Judge, Ahmedabad on which heavy reliance is placed by the learned advocate appearing for the appellant, in fact, do not affect the case of the prosecution and as they are of minor nature and as a result thereof, the order of conviction and sentence could not be altered or affected. He has further submitted that on the evidence of the witnesses as well as material produced by

the prosecution it is clearly established that the appellants-accused have committed offence under Section-20B(2) read with Section-29 of the Act and under Section-66B and 36B read with Section-81 of Bombay Prohibition Act. He has further submitted that the learned Additional Sessions Judge, Ahmedabad has discussed the entire evidence threadbare and come to the right conclusion. It is well settled position in law that merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution need not be thrown over-board as unreliable. He has, therefore, submitted that no interference is called for in the impugned order and judgment passed by the learned Additional Sessions Judge, Ahmedabad and the appeal be dismissed accordingly.

15.We have considered the submissions advanced

by Ms.Sadhna Sagar, learned advocate appearing for the appellants – original accused Nos.1 and 2 and Mr.R.C.Kodekar, learned Additional Public Prosecutor, appearing for the State of Gujarat at length. We have also undertaken a complete and comprehensive exercise of appreciating all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. We have also gone through the entire testimonial collections. We have applied our mind to the impugned judgment and order passed by the learned Additional Sessions Judge, Ahmedabad convicting the accused and sentencing them for R.I of 10 years and fine of Rs.1 lac and in default thereof to undergo further R.I of 1 year.

16. In order to find out whether the prosecution has established the charge

against the accused beyond reasonable doubt and whether the learned Additional Sessions Judge, Ahmedabad has recorded a just and correct conclusion holding the appellants – accused Nos.1 and 2 guilty, we may first advert to the oral testimony of the prosecution witnesses.

17. The case of the prosecution is more or less based upon the evidence of Police Personnels. Prosecution Witnesses Nos.1, 2, 6 and 9 are either complainant or the officials of the raiding party. Prosecution witness No.3 is the person to whom the work of weighing muddamal article was entrusted. Prosecution witness No.4 is the PSO working at Gomtipur Police Station. Prosecution witness No.5 is the FSL official, who was summoned to primarily examine the muddamal articles recovered from the accused at the place of incident. Prosecution Witness Nos.11 and 12

are FSL Officials, who have given their opinion after detailed examination of muddamal articles. Prosecution witness Nos.7 and 8 are the panch witnesses. Prosecution witness No.10 is the Investigating Officer.

18. From the detailed examination and analysis of the prosecution witnesses and the documentary evidence produced on record by the prosecution, it appears to us that various discrepancies, contradictions, omissions and infirmities are found in the oral as well as documentary evidence. A few of them are narrated hereunder:-

(a) Prosecution witnesses – Ravindra K. Bhatt, Ex.11 has stated in his deposition that after completing night round he reached to Gomtipur Police Station at about 3:30 a.m. and received the information from the private informant for the alleged incident and he has made the entry in the station diary at 3:40

a.m on 6.6.1999. Entry No.5 on page No.60 is marked as Ex.32 and produced at page-341 of the paper book. This version as stated by Mr.Bhatt is contrary to the fact found from the deposition of prosecution witness No.2 – Khengarbhai Bhavanbhai, Ex.34 who is Constable in Gomtipur Police Station and who was with Mr.Bhatt during the night round. He has stated that the information was received from the private informant at 12:30 a.m. He was with Mr.Bhatt from 12:00 p.m to 8:00 a.m. Prosecution witness No.4 – Ganpatsinh B. Parmar – PSO and Head Constable Ex.37 has stated that Mr.Bhatt has not come to the Police Station after he left the Police Station at about 12:30 a.m. He came thereafter only at 7:15 a.m and registered the complaint. Thus, at the time of receipt of the information, Mr.Bhatt's presence at Gomtipur is very much in doubt and there are different versions given by the Police Personnels.

(b) Mr.Bhatt has stated in his examination in chief that he has in his own hand writing made the entry in the station diary, Ex.32, sent information to higher official Ex.13 and 14, asked the accused whether to make their search in the presence of gazetted officer or Magistrate Ex.15 and 16, called FSL Official Ex.17, prepared seizure memo and arrest memo at Ex.19 and 20, sent information to relatives Ex.23, filed complaint Ex.24, sent letter to PSO Ex.25, sent report to Dy. Police Commissioner Ex.26 and report to the Metropolitan Magistrate Ex.27, sent Ravangi Nondh Ex.28 and prepared panchnama Ex.45. Mr.Bhatt has, however, given different version in his cross-examination and admitted that certain documents were not written by him in his own hand writing and he has simply signed some of the documents. He has further admitted that some of the documents were written by his writer – Madhubhai, who has not been cited as prosecution witness.

Prosecution witness Mr.Vaghela, who is Police Sub Inspector and prosecution witness No.10 Bimal Motilal Rajvanshi, who is Investigating Officer have also confirmed that many of the documents have not been written by Mr.Bhatt in his own hand writing. This sort of discrepancies in the prosecution witnesses raise doubt and suspicion about the truthfulness and genuineness of the documents.

(c) Mr.Bhatt in his deposition has stated that he has received CR No.5113 of 1999 on telephone from the Gomtipur Police Station whereas Ganpatsinh Parmar – PSO at Gomtipur Police Station has stated that he has not given CR number to any one on phone. He has further stated that no one has obtained CR number on phone from him. He has further stated that Mr.Bhatt has taken the CR number only at 7:00 a.m.

(d) Mr.Bhatt in his deposition has stated

that the muddamal articles were weighed at Kalidas cross road, the place from where the same were recovered from the accused. Mr.Devilal Nanalal Modi – PW No.3 Ex.36 however has stated in his examination in chief that he has weighed the muddamal article at Kalidas cross road. However, in his cross-examination he has stated that the same was done at Gomtipur Police Station. He was not aware whether the muddamal articles were seized at Kalidas cross road. He was also not aware whether the persons from whom possession of the muddamal articles were seized, were present. He has further stated that while he was weighing muddamal article at Gomtipur Police Station he was asked about his name and address. This witness is not declared as hostile. His evidence is contrary to what was stated by Mr.Bhatt in his deposition.

(e) As per the case of the prosecution the

accused have got down from the auto-rickshaw However, rickshaw number is not mentioned anywhere, neither in the complaint nor in the panchnama. Rickshaw driver was not arrested. Mr.Bhatt has not recorded his statement, Investigating Officer – Rajvanshi has recorded his further statement. He was party to the entire search and seizer and yet he was not cited as witness.

(f) As per the say of Mr.Bhatt, he has sent his report to the Dy. Police Commissioner. However, there was no signature of the Dy. Police Commissioner nor any one from his office has certified that the report was received by him.

(g) It has come on record that Mr.S.R.Yadav – PSI has taken back muddamal from the FSL. However, he has not been cited as witness nor his statement was recorded during the investigation. Investigating Officer -Rajvanshi has stated that he has not seen

during the investigation that muddamal has come back from FSL. It has come on record that the samples sent to FSL for examination were used. Thus, there were different versions about muddamal samples.

(h) Prosecution witness No.6 – Nareshkumar Vaghela, who is crime writer has stated that muddamal article was given to him on 6.6.1999 at 9:00 a.m. It was kept in the box lying in the muddamal room. The said muddamal was given to Khengarbhai at 11:00 o'clock on 7.6.1999 for making its delivery to FSL. The custody and movement of this muddamal was not properly explained and there are different versions about it.

19. Panch witnesses have not supported the case of the prosecution and they have reiterated that they were not aware about the procedure of search and seizure and their signatures were obtained only at Gomtipur Police

Station. We do not draw any adverse inference from the evidence of the panchas as there is common phenomenon that the panchas turn hostile. However, looking to the discrepancies and contradictions found in the evidence of Police Personnels and other independent witnesses, their version may assume some importance.

20. At the place of incident i.e. Kalidas cross road many independent witnesses could have found. There was SRP Choki where the jeep of raiding party was parked. However, no statement of persons from SRP was recorded nor they were cited as witnesses.

21. PW No.10 – Bimal Motilal Rajvanshi has stated in his deposition that he has recorded statement of SRP – Kalpesh Patel. He has also recorded statement of Jafarali Ansari, Shakirali Ansari, Iqbalkhan Pathan and Mohd.

Rahis Ansari, who are residing near the place of incident. He has further stated that he issued the order in writing to PSI – Mr.Chauhan as well as Mr.Yadav to make inquiry at Junagadh and Haridwar. He has also stated that Mr.Yadav has gone to Haridwar and submitted his report. However, he was transferred on 24.8.1999. The further investigation was entrusted to Mr.Bhatt. None of these persons has been cited as witness.

22. Discrepancies are found with regard to the place of weighing muddamdal, sealing procedure and muddamal samples sent to FSL for chemical and botanical analysis, which give rise to some sort of doubts and suspicions.

23. If the above discrepancies, contradictions, omissions, infirmities etc are closely viewed in their overall

perspective, it is very difficult to link the accused with the crime. Though the documentary evidence produced by the prosecution may support the case of the prosecution. It, however, appears to us that the same might have been prepared to suit the case of the prosecution. In view of the above factual background, it is not possible for the Court to confirm the conviction on the basis of such documents.

24. Over and above the aforesaid observations, as far as accused No.2 is concerned, nothing was found from him and in view of the decision of the Hon'ble Supreme Court **in the case of Sorabkhan Gandhkhan Pathan and another vs. State of Gujarat, reported in (2004) 13 Supreme Court Cases 608**, conviction of the accused NO.2 in absence of any material involving or implicating him only on the basis of he being in the auto rickshaw is

not sustainable. The accused No.2 therefore deserves to be acquitted even on this additional ground.

25. On the evidence of aforesaid witnesses as well as material produced by the prosecution it could hardly be established that the appellant Nos.1 and 2 have committed offence under Section-20B(2) read with Section-39 of the Act. Correspondingly, it is difficult to prove against them that they have committed an offence punishable under Section-66B and 36B read with Section-81 of the Bombay Prohibition Act. Thus, on close scrutiny of the evidence on record and considering the statutory provisions and judicial pronouncements on the subject, we express our inability to confirm the findings, ultimate conclusion and the resultant order of conviction and sentence recorded by the learned Additional Sessions Judge, Ahmedabad.

We are not in agreement with the said findings, ultimate conclusion and resultant order of conviction and sentence as according to us, the conclusion arrived at by the learned Additional Sessions Judge, Ahmedabad is not tenable at law looking to the facts and in the circumstances of the case.

26. In the above view of the matter, and more particularly, the fact that the accused are in jail for more than seven years the appeal is allowed. The impugned judgment and order dated 10.7.2000 rendered in Sessions Case No.199 of 1999 by the learned Additional Sessions Judge, Ahmedabad is hereby quashed and set aside. The appellants – original accused Nos.1 and 2 i.e. Gajendragiri Gurugiri Shankergiri Gajendrasinh Ramswaroop Thakur and Gaurishankargiri Guru Tripathigiri @ Anilkumar Babulal Chauhan are hereby acquitted of the charges levelled against

them. The appellants – original accused Nos.1 and 2 be set at liberty forthwith if their presence is not required in any other case. The amount of fine, if paid, be refunded to the appellants.

(A. M. KAPADIA, J.) (K. A. PUJ, J.)

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